No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

Appeal from the United States District Court, Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

CLYDE C. SHERWOOD,
703 Market Street, San Francisco 3, California,
Attorney for Appellants.

JOHN V. LEWIS,
M. L. LIEBERMAN,
703 Market Street, San Francisco 3, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

Miscellaneous

No. 13,729

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE FRENCH, JR., and MARY E. FRENCH,

Appellants,

vs.

HAROLD A. BERLINER, Former Collector of Internal Revenue,

Appellee.

Appeal from the United States District Court, Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

OPINION BELOW.

The Memorandum Opinion of the District Court (R. 56-70) is reported at 110 F. Supp. 795.

JURISDICTION.

The appeal involves federal income taxes for the calendar year 1943. Part of the taxes in dispute, to-wit, in the amounts of $19,726.79 and $19,490.80, respectively, were paid to Harold A. Berliner, former

Collector of Internal Revenue for the First Collection District on or before March 15, 1944 with the filing of appellants' 1943 income tax returns. (Finding of Fact No. 4, R. 73, and No. 14, R. 80.) The remainder of the taxes in dispute, to-wit, in the amounts of $32,718.59 and $32,717.65, respectively, were paid to former Collector James G. Smyth on November 26, 1946 and on June 5, 1947. (Findings of Fact Nos. 10 and 11, R. 77-78, and Nos. 15 and 16, R. 80-81.)

The payments of taxes to former Collector James G. Smyth were made pursuant to a deficiency determination rendered by the Commissioner of Internal Revenue through the Internal Revenue Agent in Charge at San Francisco, California. Said deficiency determination was based upon a conference statement dated February 25, 1947 which sustained the examining Revenue Agent's finding contained in a Revenue Agent's Report dated July 5, 1945 to the effect that appellant, George French, Jr. was a partner rather than an employee of the firm Oranges Brothers Construction Department and that therefore the appellants were not entitled to compute their respective tax liabilities for 1943 in accordance with the relief provisions of Section 107(a) of the Internal Revenue Code, 26 USC Section 107(a). (Findings of Fact Nos. 10 and 11, R. 77-78.)

On the 28th day of December, 1948 and within the time allowed by law, claims for refund on Form 843 were filed by appellants, seeking a refund of income taxes for the year 1943 in the respective amounts

of $32,718.59 and $32,717.65, these being the amounts paid to former Collector Smyth pursuant to the deficiency determinations aforesaid. The refund claims incorporated by reference the Revenue Agent's Report dated July 5, 1945 and the Conference Statement dated February 25, 1947 and assigned as errors of such Report and Conference Statement the holdings (1) that George French, Jr. was treated as a partner rather than an employee of the Oranges Brothers Construction Department; and (2) that appellants were barred from computing their 1943 tax liabilities in accordance with the relief provisions of Section 107(a). (Finding of Fact No. 12, R. 78-80; Refund Claims, R. 9-10 and 16-18.)

The refund claims filed by appellants as aforesaid were disallowed in their entirety by the Commissioner of Internal Revenue pursuant to registered notices dispatched on November 7, 1949. (Finding of Fact No. 13, R. 80.)

These actions were brought in the District Court by the filing of the original complaints on December 9, 1949. (R. 10 and 18.) In the original complaints, appellants named James G. Smyth, then Collector of Internal Revenue for the First Collection District of California, as the only defendant seeking recovery of the respective amounts of $32,718.59 and $32,717.65, these amounts being the precise amounts set forth in the refund claims and paid as aforesaid to the said Smyth pursuant to the deficiency assessments based upon the Revenue Agent's Report of July 5,

1945 and the Conference Statement of February 25, 1947. (See: Original Complaints, especially paragraphs III, IV and V thereof, R. 4-6 and 12-14; see, also, Stipulation, paragraphs 5 and 6, R. 52-53, and paragraph 8, R. 54-55.) The jurisdiction of the District Court rested on Title 28, United States Code, Section 1340.

The cause, on the original complaints, was tried before a jury and the result was a special verdict and judgment thereon in favor of the defendant Smyth. (R. 25-27.) The District Court having granted appellants' motion for a new trial, the appellants filed a motion for leave to file amended complaints and to join Harold A. Berliner, former Collector of Internal Revenue, as a party defendant. By order entered December 13, 1951, the District Court granted appellants' said motion. The order preserved the defendant's right thereafter to raise the question as to whether the refund claims as filed before bringing suit, supported the additional recoveries sought in the amended complaints against the defendant Harold A. Berliner. (R. 30-33.) Pursuant to the aforesaid order, appellants filed amended complaints, joining former Collector Harold A. Berliner as a party defendant. (R. 34-44.)

In the amended complaints appellants sought against defendant James G. Smyth the same recoveries prayed for in the original complaints but, in addition, sought against the defendant Berliner recoveries in the amounts of $19,726.79 and $19,490.80,

respectively, with interest from March 15, 1944. Whereas the overpayments sought to be recovered against the defendant Smyth represented deficiencies assessed and paid after the filing of appellants' 1943 tax returns, the overpayments against the defendant Berliner were claimed to have resulted from an overstatement of appellants' tax liabilities on the returns themselves, due to an erroneous computation of such liabilities under the provisions of Section 107(a) which appellants purported to apply in the preparation of the returns. (Par. III of Amended Complaints, R. 36-37 and 41-42 and prayers, R. 38-39 and 44.)

The cause, on the amended complaints, was not retried, but by stipulation filed on July 28, 1952 was submitted to the District Court for decision upon the evidence theretofore introduced at the trial, and certain facts set forth in, and certain specified documents attached to, said stipulation. (Stipulation, R. 50-55.)

The District Court awarded appellants judgment against the defendant Smyth in accordance with the prayer of the original and amended complaints, but denied the recoveries sought against the defendant Berliner in the amended complaints. The District Court placed its decision upon the ground that, as against the defendant Berliner, appellants had in their amended complaints asserted a ground of liability not included in the refund claims upon which the suits were based. (Memorandum Opinion, R. 70, Conclusions of Law, Nos. 4, 5 and 6, R. 81-82; Judgment, R. 83-84.)

The judgment of the District Court was entered on November 4, 1942 (R. 84) and on January 2, 1953 appellants filed notice of appeal, appealing from the portion of the judgment which denied them recovery against the defendant Harold A. Berliner (R. 85). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. Review of the controversy between the taxpayers, appellants herein, and the Bureau of Internal Revenue.

In preparing their 1943 income tax returns, appellants (hereinafter also referred to as the taxpayers) claimed the benefit of the relief provisions of Section 107(a) and, as part of said returns, submitted Schedule M setting forth in detail the computation of their respective liabilities under Section 107(a). (Findings of Fact Nos. 8 and 9, R. 75-76.) The returns were actually prepared and the computations made by taxpayers' consultant Frank C. Scott, C.P.A. of Stockton, California. (See: Affidavit of Frank C. Scott, R. 31-32.)

Section 107(a) provides, in effect, that a taxpayer's liability on income subject to the provisions of the Section, shall not exceed the aggregate of the liabilities computed on such income upon the hypothesis that the income was ratably received or allocable over the applicable period of years preceding the receipt

of the income. Accordingly one of the steps in computing a taxpayer's tax liability under Section 107(a) is to compute the "hypothetical" liability for each of the years over which the income received during the taxable year (1943 in our case) has been allocated. These years in the instant case included the "forgiveness year" 1942. (Finding of Fact No. 8, R. 75.)

In computing, on Schedules M of their returns, the taxpayers' "hypothetical" income tax on the income allocated to the year 1942, Mr. Scott did not claim forgiveness of 75% of such tax in accordance with the "forgiveness provisions" of Section 6 of the Current Tax Payments Act of 1943, 57 U. S. Stat. at L. 126, 26 USCA Internal Revenue Acts pp. 406-411. (Finding of Fact No. 9, R. 76-77.) As the result of such failure to reduce the tax on income allocated to the year 1942 in accordance with the "forgiveness feature" of the Current Tax Payments Act, taxpayers' returns overstated their respective income tax liabilities under Section 107(a) by the amounts of $19,726.79 and $19,490.80, respectively, representing seventy-five per cent of the tax on the income allocated to the 1942 income per Schedules M of the returns. These are the amounts sought to be recovered in the amended complaints against the defendant Harold A. Berliner, appellee herein. (Findings of Fact Nos. 9 and 14, R. 76 and 80.)

The sole reason why the taxpayers' accountant did not apply the forgiveness feature in preparing Schedule M of the 1943 returns was his compliance

with a Treasury Ruling (Reg. Section 36.6(b), T. D. 5300, 1943 C. B. p. 43, at p. 58) to the effect that taxpayers computing their 1942 or 1943 taxes under the provisions of Section 107(a) were not entitled to the benefits of Section 6 of the Current Tax Payments Act in the computation of the Section 107(a) tax on income allocable to a forgiveness year. (Affidavit of Frank C. Scott, R. 31-32.) Said Section 36.6(b) was later overruled by *William F. Knox,* 10 T. C. 550. The Commissioner of Internal Revenue published his acquiescence in the *Knox* decision in April, 1949. (C.B. 1949-1, p. 37.)

Following an audit of the taxpayers' 1943 returns, the examining Revenue Agent in his audit report dated July 5, 1945, held that the taxpayers were not entitled to compute their respective income tax liabilities for 1943 under the relief provisions of Section 107(a) of the Internal Revenue Code upon the ground that the appellant George French, Jr. was a partner, not an employee of the Oranges Brothers Construction Department. (Finding of Fact No. 10, R. 77.)

Throughout the entire controversy the parties were in agreement that appellants' right to avail themselves of the provisions of Section 107(a) depended upon whether the relationship between appellant George French, Jr. and the Oranges Brothers Construction Department constituted an employment as distinct from a partnership or joint venture.

The Conference Statement dated February 25, 1947 sustained the Revenue Agent's holding and assessed

the tax deficiencies in the amounts of $32,718.59 and $32,717.65, respectively. These were subsequently paid to the defendant Smyth and sought to be recovered by appellants in their refund claims and in these actions. (Finding of Fact No. 11, R. 77-78.)

In their refund claims duly filed before the actions were brought, appellants set forth as the basis of such claims the correctness of their 1943 tax returns and assigned as errors underlying the deficiency assessments, among others, the holdings of the Revenue Agent's Report and Conference Statement (which were incorporated in the claims) to the effect that (1) Section 107(a) was inapplicable to appellants' 1943 income; and (2) that appellant George French, Jr. was treated as a partner rather than an employee of the firm Oranges Brothers Construction Department. The amounts sought to be recovered in the refund claims were those paid pursuant to deficiency determination to Collector James G. Smyth. The claims did not specifically demand recovery of any of the taxes paid on the 1943 returns to former Collector Berliner inasmuch as the claims purported to adhere to the tax computations set forth on the returns and made without the consideration of the forgiveness feature. (Refund Claims, R. 8-10.) In this connection, it is pointed out that the refund claims were likewise computed by Mr. Frank C. Scott and were filed subsequent to the *Knox* decision and to *Arthur I. Schmidt,* 10 T. C. 550, to-wit, on December 28, 1948 but *prior* to the acquiescence therein by the

Commissioner of Internal Revenue which was published in April, 1949. (Affidavit of Frank C. Scott, R. 32: Refund Claims, R. 10 and 18.)

The Commissioner of Internal Revenue disallowed appellants' refund claims in their entirety. (Finding of Fact No. 13, R. 80.)

The answers to the original and amended complaints deny the existence of the employment relationship between appellant George French, Jr. and the Oranges Brothers Construction Department, deny the invalidity of the deficiency assessments paid to Collector Smyth, and further deny the allegations set forth in the refund claims, thus reaffirming the prior contention of the Bureau of Internal Revenue that appellants did not qualify for the benefits of Section 107(a) which contention is specifically set forth in the answers to the amended complaints. (Paragraphs III and IV of answers, R. 19-21 and 22-24; Paragraphs III and IV of answers to amended complaints, R. 45-47 and R. 48-49.)

2. Statement of procedural problem.

The only substantive issue ever raised between the taxpayers, appellants herein, on the one hand, and the Bureau of Internal Revenue and the defendant collectors on the other, during both the administrative and judicial phase of this controversy, was whether the taxpayers were entitled to compute their respective income tax liabilities for the calendar year 1943 in accordance with the relief provisions of Section 107(a) of the Internal Revenue Code, 26 USC

Section 107(a). The taxpayer-husband, George French, Jr. was employed as the superintendent of construction by Oranges Brothers Construction Department, a partnership, and his compensation was measured by a percentage of the profits. (Finding of Fact No. 6, R. 74.) The Bureau of Internal Revenue consistently held that the arrangement between George French, Jr. and the Oranges Brothers Construction Department constituted a copartnership, or joint venture. The taxpayers consistently contended that George French, Jr. was an employee of the construction company. If George French, Jr. was a copartner or joint venturer, then the taxpayers, concededly, did not qualify for the relief provided in Section 107(a) of the Code and their respective tax liabilities were correctly assessed by the Commissioner of Internal Revenue. If, on the other hand, George French, Jr. was an employee of the construction company, then admittedly, the taxpayers *were* entitled to have their income tax liabilities computed in accordance with Section 107(a) and the assessments were erroneous and excessive. The Revenue Agent's Report and Conference Statement pursuant to which the deficiency assessments were made, the rejected refund claims and the answers filed in the actions below, all present the single contention that plaintiffs were not entitled to have their tax liabilities computed in accordance with Section 107(a). (Finding of Fact No. 8, R. 75, Findings of Fact Nos. 10 and 11, R. 77 and 78; Refund Claims, R. 9 and 16-17; see paragraphs III, IV and V, of original complaints, R. 4-7 and 12-15; para-

graphs III, IV and V of answers, R. 20-21 and 22-24; paragraph 2 of Memorandum Opinion entitled "Questions Presented", R. 58-59.) To the contrary, the trial Court found, as a fact, that George French, Jr. was an employee of the construction company and that the taxpayers were, therefore, as a matter of law, entitled to avail themselves of the relief provisions of Section 107(a). (Finding of Fact No. 6, R. 74; Conclusion of Law No. 3, R. 81.) Accordingly, the District Court awarded appellants judgment against the defendant Smyth in accordance with the prayer of the original and amended complaints. The defendant Smyth having dismissed his appeal, the appellants' right to the benefits of Section 107(a) has become settled by final decision.

Not only has appellants' right to compute their 1943 tax liabilities in accordance with Section 107(a) become incontrovertible, but the results of such computation are equally beyond the realm of dispute. Under the rule of law promulgated in the *Knox* case and now recognized by the Commissioner of Internal Revenue, appellants' respective tax liabilities and tax overpayments for the year 1943 are as set forth in their amended complaints; that is to say, appellants have admittedly overpaid their 1943 taxes not only by the amounts sought to be recovered from the defendant Smyth, but additionally by the amounts sought to be recovered from the defendant Berliner, appellee herein. In short, the Government has admittedly been unjustly enriched by the money which should never have been assessed and collected by for-

mer Collector Berliner, and its position simply is that it can retain such unjust enrichments because of an alleged defect in the refund claims filed by appellants.

The District Court below sustained the position of the Government as to the overpayments sought to be recovered in the amended complaints from the appellee herein. These overpayments, it will be recalled, are attributable to the application of the forgiveness provisions of the Current Tax Payments Act in the computation of appellants' 1943 tax liabilities under Section 107(a). The District Court was of the opinion that the applicability of the forgiveness feature in the computation of appellants' tax liabilities under Section 107(a) was a "ground for refund", separate and distinct from the basic ground concerning appellants' eligibility for the benefits of the section. The District Court further held that the "ground" relative to the applicability of the forgiveness feature underlying appellants' claim against the defendant Berliner had not been set forth in the refund claims which merely sought recovery of the amounts paid as deficiencies to Collector Smyth. Accordingly, the Court concluded that as to the defendant Berliner, appellee herein, there was a fatal "variance" between the refund claims and the amended complaints which precluded the recovery of the admitted overpayments made to the said Berliner as a result of appellants' failure to take advantage of the forgiveness feature in computing their 1943 taxes. (Memorandum Opinion at R. 59 and 70.)

In opposition to the appellee's contention and the District Court's holding, appellants contend that once the basic issue or "ground" plainly set forth in the refund claims is resolved, namely that appellants are entitled to the benefits of Section 107(a), then the resulting tax liability and amount of refund is a mere matter of computation under the plain provisions of the income tax law, which include the application of the forgiveness provisions of the Current Tax Payments Act; moreover all of the facts and data necessary for the computation of the tax liability and refund according to the statutes are set forth in the schedules M attached to taxpayers' 1943 tax returns which are incorporated by reference in the refund claims. Thus appellants' failure, in their refund claims, to take into account the forgiveness feature and to compute the refunds in amounts which included the overpayments made to former Collector Berliner is no more than an omission of a *computational detail,* or an error as to the *amount* of the refund, neither of which is fatal to recovery.

QUESTION PRESENTED.

Did the amended complaints assert, as against the defendant Berliner, appellee herein, a "ground upon which a refund is claimed" that was not included in the refund claims filed by appellants on December 28, 1948 and attached to the original complaints on file herein; or, conversely, were the said refund claims sufficient within the meaning of Section 3772(a)(1)

of the Internal Revenue Code and pertinent Treasury Regulations (Reg., Section 29.322-3) to support the recoveries sought against the appellee in the amended complaints?

In the argument hereinafter contained appellants propose to show:

I. That the claims in question met all of the requirements of the statutes, regulations and Court decisions as to their sufficiency in form and content;

II. That the District Court's holding to the contrary is not supported by the authorities on which it relied; and

III. That the District Court misconstrued the law in holding that failure to take into account the forgiveness feature of the Current Tax Payment Act went to the substance of the claims rather than merely to the routine computation of the tax.

STATUTE AND REGULATIONS INVOLVED.

The applicable provisions of the Statute and Regulations are set forth in Note 1, Appendix, *infra.*

SPECIFICATION OF ERRORS.

1. The District Court erred in denying appellants judgment against the defendant Harold A. Berliner, appellee herein, in accordance with the prayers of

their respective amended complaints upon the ground that, as against said defendant, the amended complaints asserted "a ground upon which a refund was claimed" that was not encompassed in the refund claims filed by appellants.

SUMMARY OF ARGUMENT.

The Statute and the Regulations thereunder pertaining to the filing of refund claims require that the taxpayer in his refund claim set forth in detail each "ground upon which a refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof."

The District Court in holding that the amended complaints asserted as against the defendant Berliner, appellee herein, a "ground upon which a refund is claimed" that was not included in the claim filed with the Collector, assumed, without analysis of the question, that a Section 107 taxpayer's reliance upon the forgiveness provisions of the Current Tax Payments Act constituted, within the meaning of the Regulations, a "ground" separate and distinct from the taxpayer's basic right to avail himself of the benefits of the section. This assumption is erroneous. Upon analysis, it is shown that the application of the forgiveness feature is not a "ground upon which a refund is claimed"; it merely relates to the computation of a taxpayer's liability and is similar to the application of a tax rate. Accordingly, the omission of the

forgiveness feature in the refund claims does not affect their conformity to the requirements of the Regulations.

The right of appellants to compute their tax liabilities under Section 107a was the sole ground upon which their respective recoveries against *both* defendants were based. That ground and all facts in support thereof including all of the data necessary to the computation of appellants' 1943 tax liabilities and total overpayments were set forth in detail in the refund claims; accordingly the claims were no less sufficient as against the defendant Berliner than they were as against the defendant Smyth.

Because the District Court misconstrued a taxpayer's reliance of the forgiveness feature as a "ground" for refund within the meaning of the statute and regulations, the Court mistakenly relied upon the decisions dealing with substantive variances between refund claims and complaints. Since the application of the forgiveness feature merely relates to the computation of the amount of the refund, this case comes within the rationale of the decisions which hold that the correct statement of the amount in a refund claim is not material to its sufficiency.

ARGUMENT.

1. THE APPLICABLE STATUTE AND REGULATIONS. THE MEANING OF THE TERM "GROUND" AS USED IN THE REGULATIONS.

Section 3772(a)(1) of the Internal Revenue Code (26 USC Section 3772(a)(1)) provides that "no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * *, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and regulations of the Secretary established in pursuance thereof."

The pertinent regulations (Regulations Section 29.322-3) in force on December 31, 1948, the date of the filing of the refund claims involved herein, provide that "Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843" and that:

> "The claim must set forth in detail and under oath each *ground* upon which a refund is claimed, and *facts* sufficient to apprise the Commissioner of the *exact basis* thereof * * *. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund." (Emphasis supplied.)

The administrative rules relating to refund claim hereinabove quoted, set forth a *dual* requirement, to-wit, a statement of each "*ground* upon which a re-

fund is claimed" and a statement of "*facts* sufficient to apprise the Commissioner of the exact basis thereof". Is "the exact basis thereof" the factual basis of "the claim" or of "the ground" relied upon? Since in the context of the regulation, the noun "ground" more immediately precedes the term "thereof", it must be considered, under normal rules of syntax, that the statement of facts called for by the regulations is that in support of the particular "ground" relied upon, rather than a statement of facts in support of the "claim" as a whole. The foregoing interpretation was adopted by this Court in *Rogan v. Ferry* (CCA-9; 1946), 154 F. (2d) 974, 977, 34 AFTR 1167-1170. The interpretation is all the more reasonable in view of the obvious incongruity of requiring a *separate* statement of the several grounds, each of which may be supportable by a different set of facts and yet permitting a single statement of facts in support of the claim as a whole. It follows that, as contemplated by the regulations, a ground assertable in a refund claim and the supporting statement of *facts* constituting the exact basis thereof are linked together as correlative concepts much the same way as a legal conclusion and the supporting ultimate facts. Viewed in this light, the term ground simply means the legal position upon which the refund claim rests, a usage which is in full accord with the dictionary meaning of the term.[1]

---

[1]The term is defined as "*a position to be maintained;* a point of view; opinion; belief".

Webster's New International Dictionary, 2d ed. (1952), p. 1106.

The District Court based its decision upon the rule that a taxpayer is not permitted to urge before the Court a "ground" not presented in the refund claim filed with the Bureau of Internal Revenue. (Memorandum Opinion, R. 66-68.) The Court below held that the amended complaints asserted a "ground upon which a refund is claimed" that was not included in appellants' refund claims, to-wit, appellants' reliance upon the "forgiveness" provisions of Section 6 of the Current Tax Payments Act of 1943. Said the District Court after reviewing the contents of the refund claims (R. 61):

> "The above constituted the only 'assignments of error' contained in the plaintiffs' claims for refund filed with the Collector. There is in those assignments not the slightest intimation, either of fact or of law, that the taxpayer was relying upon the 'forgiveness' provisions of Section 6 of the Current Tax Payment Act of 1943."

Obviously, not *any* omission of information in a refund claim is a violation of the regulations. To be fatal, the omission must be that of a *"ground"* for refund or of a *fact* which is part of the "exact basis thereof". Unfortunately the District Court simply *assumed* the point at issue, namely, that a taxpayer's reliance on the forgiveness provisions of Section 6 of the Current Tax Payments Act constituted "a ground upon which a refund is claimed" within the meaning of the regulations quoted. The Court never analyzed, indeed, it never even adverted to, the question. Therein, as will be shown, lies the lower Court's funda-

mental error. But, before proceeding with the analysis of the question we propose to review the contents of the refund claims in the light of the administrative requirements.

---

2. TESTING THE REFUND CLAIMS AGAINST THE REQUIREMENTS SET FORTH IN THE REGULATIONS.

To begin with, the claims were filed under oath on Form 843. The sole "ground upon which a refund was claimed" was appellants' asserted right to compute their 1943 tax liabilities in accordance with the provisions of Section 107(a) as set forth on their 1943 tax returns. This ground was asserted in several different ways. First, the deficiencies assessed pursuant to the Revenue Agent's Report of July 5, 1945 and the Conference Statement of February 25, 1947 (which Report and Statement were incorporated by reference) were claimed to be erroneous, thus contesting the holdings of the report and statement that George French, Jr. was an employee of the Oranges Brothers Construction Department and that the taxpayers were not entitled to the benefits of Section 107(a).[2]

---

[2]The portion of the refund claim referred to reads as follows:

"The claimant was assessed in error deficiencies in income and victory taxes for the taxable period shown above, which were paid in full on November 26, 1946 and June 5, 1947 on the basis of a report of internal revenue agent Robert L. Driscoll dated July 5, 1945 and a conference statement under the symbols 'IRA:Conf./HVH' issued by the office of the internal revenue agent in charge at San Francisco, California under date of February 25, 1947, which report and statement are incorporated herein by reference. The whole amount of the deficiencies $28,143.10 is claimed for refund with the interest paid thereon $4,575.49, together with the interest on the total overpayment claimed for refund according to law."

Secondly,[3] each of the taxpayers asserted "specifically as a basis for the refund claimed herewith" that his or her 1943 tax return truly and correctly reflected his or her tax liability, thereby adopting and incorporating in the claim the detailed computations of the tax liability under Section 107(a) as set forth in Schedule M of said return. Thirdly, the taxpayers assigned as errors underlying the deficiencies assessed pursuant to Revenue Agent's Report and Conference Statement the following:

(1) The denial to appellants of the right to apply the provisions of Section 107(a) in the computation of their respective tax liabilities for 1943; and

(2) The treatment of the taxpayer-husband (appellant George French, Jr.) as a partner of the Oranges Brothers Construction Department

---

[3]The portion of the refund claim hereinafter referred to reads as follows:

"The claimant claims specifically as a basis for the refund claimed herewith that his Form 1040 income and victory tax return for the calendar year 1943, showing a total income and victory tax liability of $69,150.12 and his amended Form 1040 income tax return for the calendar year 1942 were in all respects true and correct returns of his taxable income and victory taxes for those years, and that the assessments of deficiencies on the said return for the calendar year 1943 were, with reference to the report and statement described above and incorporated herein by reference, based on the following errors:

(1) The disallowance of the application of the provisions of section 107, Internal Revenue Code, in limitation of his income and victory tax liability on compensation for services received in 1943 for services during and for a period of more than 36 months, as computed in his said return for 1943;

(2) The computation of his income from services during the years 1942 and 1943 on the theory that, and as if he had been a member of a partnership, Oranges Brothers Construction Division; and * * *"

for the purpose of computing his income for the years 1942 and 1943.

Parenthetically, it might be pointed out that, while perhaps presented as parallel errors, the first assignment of error is but a legal conclusion deriving from the second error which is in the nature of an erroneous finding of fact. But be that as it may, the refund claims apprised the Commissioner of Internal Revenue, *in full detail,* of the following:

(1) the "ground" or legal position upon which the refund was claimed, to wit, that contrary to the Commissioner's *holding,* the taxpayers were entitled to avail themselves of the benefits of Section 107(a) (through the first assignment of error above referred to, the denial of the validity of the deficiency assessments, the denial of the findings and holdings contained in the Revenue Agent's Report and Conference Statement, and through the adoption of the 1943 tax returns as correctly reflecting the taxpayers' liabilities);

(2) *the facts* "sufficient to apprise the Comsioner of the exact basis" of the "ground" relied upon, to-wit:

a. That, contrary to the Commissioner's *finding,* George French, Jr. was an employee rather than a partner of the firm, Oranges Brothers Construction Department (through the second assignment of error and the denial of the findings and holdings contained in the Revenue Agent's Report and Conference Statement).

b. by referring to, and adopting, the 1943 tax returns, and Schedule M included therein, the factual showing necessary to bring a taxpayer within the purview of Section 107(a), to wit, the period over which the personal services of George French, Jr. extended, the total compensation received, the dates of receipt and compliance with the requirement that more than 80 per cent of the compensation was received in the taxable year 1943. (See, Finding No. 8, R. 75-76; Schedule M, Plaintiff's Exhibit 6, 1943 income tax returns of appellants.)

(3) by referring to, and adopting the 1943 tax returns and Schedule M included therein, *every single datum* necessary to the computation of the taxpayer's respective tax liabilities under Section 107(a) as called for by Schedule M, specifically the proper allocation of the income under Section 107(a) over the years 1938 to 1943 and the computation of the tax liabilities on the income allocated to the several years including the forgiveness year 1942 albeit that for that year the 75 per cent portion of the tax forgiven was not subtracted. (See, Findings Nos. 8 and 9, R. 75-76; Schedule M, Plaintiffs' Exhibit 6, 1943 income tax returns of Appellants.)

The recoveries sought in the amended complaints whether against the defendant Smyth or the defendant Berliner, both necessarily proceeded upon the same ground, to-wit, appellants' right to the benefits

of Section 107(a) for if appellants had no such right they had no cause of action against either of the defendants. On the other hand, if appellants did qualify for the relief provision, they actually overpaid their taxes by the excess of the amounts paid to any and all Collectors over their liabilities computed under Section 107(a). The form provided by the Treasury Department for refund claims, Form 843, nor the Regulations require a taxpayer to specify the amounts paid to several Collectors, respectively. The quoted regulations provide that "claims for refunding of taxes * * * erroneously or illegally collected shall be made on Form 843". In other words, the claim on Form 843 is one for the *total taxes* erroneously or illegally collected, being the excess of the actual payments over the tax liability as computed upon the statement of grounds and facts set forth in the claims. Whether such excess was paid to one collector or the other is immaterial. Thus, the ultimate measure of recovery, as against either of the Collectors was appellants' *correct* tax liability under Section 107(a) which controlled the amount of "erroneously or illegally collected taxes".

As above indicated, the refund claims duly set forth the ground of recovery, the supporting statement of facts, and all details necessary to the computation of taxpayers' correct tax liability under Section 107(a). The failure to subtract the forgiven portion of the 1942 tax is not the omission of a datum upon which a computation is based but a failure to *apply* a computational step to the data at hand. But, that aside,

since the contents of the refund claims were found sufficient to sustain the recoveries against the defendant Smyth, there is no foundation under the regulations for declaring them defective as against the defendant Berliner for the recovery sought against him of taxes "erroneously or illegally paid" was based upon the same *ground* and the *same measure,* to-wit, appellants' correct tax liability computed under Section 107(a).

---

3. **WHERE A TAXPAYER CLAIMS THE BENEFITS OF SECTION 107(a), I.R.C., HIS RELIANCE ON THE FORGIVENESS PROVISIONS OF SECTION 6 OF THE CURRENT TAX PAYMENTS ACT IS NOT A SEPARATE "GROUND UPON WHICH A REFUND IS CLAIMED" WITHIN THE MEANING AND THE POLICY OF THE STATUTE AND THE REGULATIONS.**

Under the decision of the District Court which has now become final, the refund claims set forth a sufficient statement of both the ground (or grounds) and the factual basis for the recoveries against the defendant Smyth. The portion of the judgment appealed from is therefore sustainable only upon the theory that the ground of recovery urged against the defendant Berliner is separate from, and totally *independent* of, the ground of recovery underlying the judgment against the defendant Smyth. The sole ground of recovery against the defendant Smyth was appellants' right to compute their 1943 tax liabilities in accordance with the provisions of Section 107(a). Accordingly, the question arises as to whether a Section 107 taxpayer's right to avail himself of the for-

giveness provisions of the Current Tax Payments Act can be divorced as a separate "ground" or "legal position" from the basic right to the benefits of the section. In other words, could the Commissioner recognize a taxpayer's right to compute his tax liability under Section 107(a) and yet validly deny him the right to avail himself of the forgiveness feature in computing the "hypothetical tax" on income allocable under Section 107(a) to a forgiveness year? The answer of the Tax Court in *William F. Knox, supra,* is in the negative and the Commissioner has accepted the answer by his acquiescence in that decision.

After carefully reviewing the legislative history and purpose of the Act, the Tax Court, in the *Knox* case, concluded that the Current Tax Payments Act was legislation of *universal application,* embracing all taxpayers, including those computing their liabilities under Section 107; it was therefore *mandatory* in a Section 107 case, for the Commissioner to give effect to the forgiveness provisions in the computation of the tax under Section 107. See: Appendix Note 2.

Moreover, to consider the applicability of the forgiveness feature as a separate "ground" for refund does violence to the use of the term in the regulations. Assuming that a taxpayer's reliance on the forgiveness provisions as to the year 1942 *were* a ground separate and apart from his right to relief under Section 107(a), what would the correlative statement of facts supporting such ground be? Obviously, *any* taxpayer computing his 1942 tax liability

whether under Section 107(a) or otherwise, would be entitled to the same benefit. As applied to such a "ground" the requirement of a supporting statement of fact is *meaningless.* In short, such a "ground" does not fit the "correlative concept" of ground and statement of facts contemplated by the administrative rules and hence is not a "ground upon which a refund is claimed" within the meaning of the regulations.

Finally, the Tax Court clearly characterized the forgiveness feature of the Current Tax Payments Act as one dealing with *rates,* saying:

> "As to the forgiven year, the Act did, in fact, deal with rates, since its effect was to establish as the rate of tax only the unforgiven portion."

The reduction of the tax under the forgiveness feature is indeed analogous to the reduction of the combined tentative normal tax and tentative surtax by the applicable percentage as provided in Section 12 of the Internal Revenue Code, whereby the combined normal tax and surtax was computed for taxable years beginning after December, 1945 and before October 1, 1950. Section 101, Revenue Act of 1945; Section 101, Revenue Act of 1948. Section 12 of the Code is clearly one dealing with tax rates.

Assume the facts of this case with but one change, namely, that the overstatement of the tax on the 1943 returns resulted from the application of the wrong tax rate to the year 1942 rather than from the failure to apply the forgiveness feature, and that the

error was not discovered until after trial and was sought to be corrected by the filing of amended complaints. Would the Commissioner or the Collector seriously contend that the taxpayer had asserted in the amended complaints a new "ground" of recovery, or that the taxpayers' failure to call the Commissioner's attention to the correct tax rate in the refund claims was fatal to their recovery of the full overpayments?

It would hardly be suggested that a computational error, such as the application of the wrong tax rate, should be assimilated to the substantive ground of recovery upon which the claim is based. The Commissioner of Internal Revenue depends upon the taxpayer apprising him of the ground of recovery and the factual basis thereof so that he may be properly guided in his investigation of the claim and have an opportunity to reconsider or correct prior action taken by his office. That, indeed, is the underlying policy of the requirements imposed by the statute and the regulations. *W. C. Tucker v. Alexander* (1926), 15 F. (2d) 356, 357; 6 AFTR 6338, 6339, reversed on another point (1927), 275 U.S. 228, 6 AFTR 7070, quoted in GCM 1020, *C. B. June,* 1927, p. 119; *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 977, 34 AFTR 1167, 1170. See: Appendix, Note 3. *Electric Storage Battery Co. v. McCaughan* (D.C. 1931), 54 AFTR 814, 10 AFTR 909. Obviously, the Commissioner requires no aid from the taxpayer to be informed as to the applicable provisions of law govern-

ing the computation of a taxpayer's liability in a given situation such as rate provisions, including the forgiveness provisions of the Current Tax Payment Act. Accordingly a taxpayer's reliance on such provisions does not come within the policy of the statute and regulations.

---

4. THE DECISIONS CITED BY THE DISTRICT COURT REQUIRING STRICT COMPLIANCE WITH THE REFUND STATUTES AND REGULATIONS HAVE NO APPLICATION TO THIS CASE.

In its Memorandum Opinion (R. 62-66) the District Court quoted at length from *Nicholl v. United States* (1869), 74 U.S. 122, *United States v. Felt & Tarrant Co.* (1931), 283 U.S. 269, and *Maas & Waldstein & Co. v. United States* (1931), 283 U.S. 583, 9 AFTR 1465, to show that the filing of a refund claim setting forth definite grounds for the refund is a condition precedent to suit and that *strict* compliance with the condition was essential both under the refund statutes and the regulations. The principle is, of course, recognized by appellants. It was clearly dispositive of the issue in the cases cited, for in those cases *no refund claim had been filed or no specific ground had been stated in the claim.* The principle relied upon by the District Court is, however, no answer to the basic issue herein, that is, as to whether the refund claims filed by appellants failed to state an essential ground of refund as against the defendant Berliner. Nor do this Court's decisions in *Vica Co. v. Commissioner* (CCA-9, 1947), 159 F. (2d) 148, 150, 35

AFTR 647, *cert. denied* 331 U.S. 833 (1947), and in *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 34 AFTR 1167, lend support to the District Court's holding. These decisions essentially restate the rule expressed in the regulations.

In the case of *Rogan v. Ferry, supra,* this Court, incidentally, takes what might be called a liberal view of the statutory and administrative requirements relating to refund claims, stressing as their main purpose the function to apprise the Commissioner of the *facts* so as to guide his investigation rather than to lay "traps for the unwary".

---

5. SIMILARLY, THE DECISIONS CITED BY THE DISTRICT COURT DEALING WITH A VARIANCE BETWEEN THE GROUNDS URGED IN THE REFUND CLAIM AND THOSE URGED IN THE SUIT HAVE NO APPLICATION HEREIN.

The District Court invoked the well settled rule that a taxpayer cannot urge before the Court a ground for refund not specified in his refund claim, citing *Real Estate-Land Title & Trust Co. v. United States,* 309 U.S. 13, 23 AFTR 816, and *Nemours Corporation v. United States* (CCA-3, 1951), 188 F. (2d) 745, 40 AFTR 485, *cert.* den. (1951) 342 U.S. 834. In these cases, the taxpayer urged one substantive ground of recovery in the refund claims and in the suit shifted to another ground based upon a different section of the Internal Revenue Code. The lower Court's error in citing cases dealing with substantive variances is, of course, attributable to his erroneous assumption

that a Section 107 taxpayer's reliance on the forgiveness feature constitutes a separate ground for refund.

---

6. **THE DISTRICT COURT MISCONSTRUED THE FAILURE TO APPLY THE FORGIVENESS FEATURE AS GOING TO THE SUBSTANCE OF THE CLAIM RATHER THAN TO THE COMPUTATION OF THE AMOUNT. THIS CASE COMES WITHIN THE RATIONALE OF THE DECISIONS HOLDING THAT THE CORRECT COMPUTATION OF THE AMOUNT IN THE REFUND CLAIM IS NOT ESSENTIAL TO THE SUFFICIENCY OF THE CLAIM.**

Where the income of a taxpayer qualifying for the benefits of Section 107 is apportioned over a period of years which includes the forgiveness year 1942 the hypothetical tax liability computed for such year is subject to reduction by 75 per cent under the rule of the *Knox* case. The computation of the tax for the forgiveness year is one of the phases in the computation of the aggregate tax liability under Section 107(a) which is the sum of the tax liabilities computed for the several years over which the income has been allocated. Thus the application of the forgiveness feature is but one step—and a rather mechanical step at that—*in the computation of the amount* of a Section 107 taxpayer's liability or refund which is measured by the liability.

The Courts have held that a refund claim is not defective merely because it understates *the amount* sought to be recovered in the suit. Thus, in the case of *Electric Storage Battery Co. v. McCaughan* (D.C. Penn., 1931), 54 F. (2d) 814, 10 AFTR 999, the plain-

tiff was allowed to recover the sum of $825,151.52 for taxes illegally collected, although the amount specified in the refund claim was only $148,381.05. Said the Court:

> "I am satisfied that the claim for refund in this case was a sufficient requirement of the statute as to the amount of $148,381.05 as well as to the larger amount of $825,151.52. * * * Under a claim for refund which specifies a certain amount 'or such greater amount as is legally refundable', the plaintiff may sue for a larger amount than is set forth in the complaint, *provided the entire suit proceeds on the grounds set forth in the claim for refund. The purpose of the statutory requirement, to give the Commissioner full opportunity to reconsider and modify, if he so desires, the rulings of his office, has been accomplished. The exact amount claimed is a matter of little importance.*" (Emphasis added.)

In *International Curtis Marine Turbine Co. v. United States* (1932), 74 Ct. Cl. 132, 56 F. (2d) 708, 10 AFTR 1395, the plaintiff corporation had recovered in a suit the amount stated in its refund claim to be due it on account of the Commissioner's refusal to allow any depreciation deduction in respect of certain properties. Thereafter, the plaintiff filed a refund claim and suit for a further amount alleged to be due on account of additional depreciation allowable in respect to the properties in question. The Court held the second suit barred under the doctrine of *res adjudicata* and the rule against splitting a single cause of action, explaining that the additional

amount was recoverable in the first suit and upon the first claim. Said the Court (56 F. (2d) 711, 10 AFTR 1398):

> "In order to make a refund of any amount for depreciation, a computation of the tax after the proper allowance had been made therefor must first be made, and without such a computation the amount of the refund could neither be determined nor paid. The Commissioner could, as he did, refuse to allow any depreciation whatever, but this was merely denying plaintiff's claim at the outset and refusing to do what plaintiff asked to have done. The nature of plaintiff's claim was one for deduction on account of depreciation coupled with the claim for a refund on the basis of such an allowance."

To the same effect are *F. W. Woolworth Co. v. United States* (CCA-2, 1937), 91 F. (2d) 973, 20 AFTR 205, *cert. den.* 1-7-38, reversing on another point, 15 F. Supp. 679, 18 AFTR 310; *Dalton Foundries v. United States* (Ct. Cl., 1932), 56 F. (2d) 483, 487, 10 AFTR 1335, 1339; *Dixie Margarine Co. v. United States* (Ct. Cl., 1935), 12 F. Supp. 543, 16 AFTR 1156, *cert. den.* 3-2-36.

In the case of *Osborne v. United States* (Ct. Cl., 1931), 54 F. (2d) 824, 10 AFTR 1000, plaintiff's income from the sale of certain property depended upon the March 1, 1913 value of the property in question. The plaintiff in his income tax return computed his income upon the basis of a value of $100,000.00. The Commissioner of Internal Revenue assessed a defi-

ciency by reducing the value to $50,030.00. The plaintiff filed a claim for refund, reasserting a value of $100,000. In the suit plaintiff proved a value of $110,100.00 and sought a refund accordingly. The Collector of Internal Revenue sought to limit the plaintiff's refund to that resulting from the valuation of $100,000.00 set forth in the claim for refund. In holding for the plaintiff, the Court said as follows:

> "Nor is the taxpayer limited in a suit to recover an overpayment computed upon a value which may have been stated in the return and repeated in the claim for refund where the Commissioner of Internal Revenue refuses to allow the claim and determines a smaller value. Neither the statute nor the regulations with reference to a claim for refund require that figures stated therein in support of the claim shall be set forth with absolute accuracy. It would be going far beyond the purpose and intent of the statute and the regulations relating to claims for refund and sets as the basis thereof the March 1st, 1913 value of certain property he is thereafter barred from recovering a refund in excess of the amount resulting from the value which may be set forth in the claim in support of the grounds thereof."

On its facts, the instant case closely parallels the *Osborne* case. As here, so in the *Osborne* case, the taxpayers were assessed a deficiency because the Commissioner rejected the basis upon which the return was filed. The taxpayers filed refund claims merely reaffirming the returns and demanding a refund of the deficiencies only. The Commissioner rejected the

claim. In the suit the taxpayers asserted, in effect, an overstatement of their liability on the returns, demanding a recovery in excess of the deficiencies and of the amounts set forth in the claims. The Court rejected the Government's attempt to limit the taxpayers to the recovery sought in the refund claims.[4]

In *Keneipp v. United States* (App.D.C., 1950), 184 F. (2d) 263, 39 AFTR 1039, *cert. den.,* the taxpayers reported a long-term capital gain from a condemnation award in their 1941 return. The Commissioner assessed a deficiency of $857.96 (which was paid) upon the ground that a portion of the gain was ordinary income. The refund claim, in broad terms, took exception to the Commissioner's theory and assumptions as entirely "unwarranted by the facts" but was accom-

---

[4]It is true in the above cases where the taxpayer recovered a larger amount than specified in his claim for refund, the official Form 843 called for the "amount to be refunded *or such greater amount as is legally refundable*". The pertinent cases hold that "For the period named in the refund claim the taxpayer may recover the amount of the payment proved by him to have been made irrespective of the amount set forth in the refund claim. *Dixie Margarine Co. v. United States, supra.* While the italicized clause has since been eliminated from the official Form 843, this does not mean that the rule permitting a taxpayer to recover the amount proved rather than that specified in the claim has changed. First, this would be in contradiction to the reasoning of the Courts which hold that the purpose of the refund claim is to advise the Commissioner of the grounds and facts relied upon by the taxpayer, the amount of the refund being a matter of little importance. Secondly, the Government could hardly assume that by eliminating the clause, "*or such greater amount as is legally refundable,*" it changed the rule in regard to the amount recoverable upon refund claims. Under the statute (Section 3772(a)(1) of the Internal Revenue Code) changes in requirements for filing refund claims can be effected only through the Regulations and not by the deletion of words in a printed form designed to "lay a trap for the unwary".

panied by a statement containing many details regarding the condemned property. Negotiations between the taxpayer and the Bureau in 1945 relative to the refund claim indicated that the Bureau was aware that the taxpayers contested the entire treatment of the award claiming that no part of it was income in the year 1941. A second refund claim which was, admittedly, untimely, was filed setting forth the latter position. The refund claims, having been rejected, the taxpayers filed suit, demanding a refund of the entire tax paid on the 1941 return, in accordance with the theory of the second refund claim. The Court of Appeals held that the first refund claim was sufficiently broad and definite to raise the question as to the entire treatment of the award, notwithstanding the fact that the amount therein claimed was based only upon contesting the Commissioner's treatment of a portion of the award. Accordingly, the Court concluded that the untimeliness of the second claim was immaterial as the first claim was sufficient to support the larger recovery sought in the complaints.

By analogy to the *Keneipp* case, appellants' refund claims were broad and definite enough to advise the Commissioner that the *entire* application of Section 107(a) to the appellants' situation was placed in issue including the subordinate question of the applicability of the forgiveness feature as to which the Commissioner had admitted that his regulations were contrary to the law (Section 6, Current Tax Payments Act)

after the filing of the refund claims. Hence the claims constitute a sufficient basis for the amended complaints and no amendment to the claims was necessary.

The District Court, in the instant case, agreed with the proposition that errors in the computation of the amount of the refund did not impair the sufficiency of a refund claim. The Court rejected, however, and indeed ridiculed appellants' contention that the omission of the forgiveness feature amounted to no more than an error of computation as distinct from a ground of refund. "The short answer to this argument," the Court said, "is that Professor Einstein himself, *unless he had known of the existence of Section 6 of the Current Tax Payments Act of 1943,* could not have 'computed' the plaintiffs' income tax returns so as to have invoked the 'forgiveness' provisions of that statute!" (Emphasis supplied.) [Memorandum Opinion, R. 69.]

But what does the "short answer" prove? Knowledge of the *rules of computation* is of course essential to any person's ability to calculate a desired quantity, be it a quantity of mathematical physics or a liability under the tax law. It makes no difference whether that person be Professor Einstein or the Commissioner of Internal Revenue. According to the Tax Court, an expert body on questions of tax law, the forgiveness provision of Section 6 of the Act is no more than a *rule of computation,* similar to the application of a tax rate. *William F. Knox, supra,* in

which the Commissioner promptly acquiesced. The crux of the matter is that whatever the statutory function of a refund claim may be, its purpose, most certainly, is not to instruct the Commissioner as to applicable tax rates or other rules of law governing the computation of tax liabilities in a given situation. These the Commissioner is presumed to know. Hence, the omission of such information from refund claims is utterly immaterial to their sufficiency.

CONCLUSION.

For the foregoing reasons, the portion of the judgment of the District Court from which this appeal is taken should be reversed and remanded to the District Court with directions that the District Court enter judgment for appellants and against the defendant Harold A. Berliner, in accordance with the respective prayers of the amended complaints.

Dated, San Francisco, California,
August 28, 1953.

CLYDE C. SHERWOOD,
Attorney for Appellants.

JOHN V. LEWIS,
M. L. LIEBERMAN,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

NOTE 1. STATUTE AND REGULATIONS INVOLVED. The applicable statute relating to suits for tax refunds is Section 3772 of the Internal Revenue Code, 26 USC, Section 3772, which reads as follows:

> "(a) Limitation s
>
> "(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

The regulations relating to "Claims for Refund by Taxpayers" are found in Regulations 111, Section 29.322-3, Code of Federal Regulations, 1943, Cumulative Supp., Title 26, pp. 6443-6444, as Amended in 1944 Sup., *id.*, pp. 1989-1990. Regulations 111, Section 29.322-3, in force on December 28, 1948, the date of the filing of the refund claims involved herein, read in part as follows:

> "REG. 111, SEC. 29.322-3 (As amended by T. D. 5325, Jan. 8, 1944, T. D. 5333, February 28, 1944 and T. D. 5425, Dec. 29, 1944). *Claims for*

refund by taxpayers.—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040 A, or by the use of Form W-2 (Rev.), as provided in this section, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each *ground* upon which a refund is claimed, and *facts* sufficient to apprise the Commissioner of the *exact basis thereof.* * * * A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund."

NOTE 2. In *William F. Knox* (1943) 10 T. C. 550 the Tax Court stated as follows (at pp. 556-557):

"The Current Tax Payment Act, on the other hand, was legislation of general application dealing not with a restricted class, such as non-resident aliens, but with all taxpayers; no question of status in one year or another was involved. As to the forgiven year, the act did in fact, deal with rates, since its effect was to establish as the rate of tax only the unforgiven portion. The doctrine of the *Stallforth* case has, we think, no bearing upon such a question as to the present, where the relationship of section 107 to other

legislation of universal application is the central issue.

We accordingly view respondent's refusal to permit petitioner to apply the provisions of the Current Tax Payment Act to the computation of his tax under section 107 as unwarranted. The deficiency is disapproved."

NOTE 3. G. C. M. 1020, C. B. June, 1927, p. 119, reads in part as follows:

"As stated by the Circuit Court of Appeals of the Fifth Circuit in the case of W. C. Tucker v. Alexander [15 F. (2d) 356, 6 AFTR 6338, reversed on another point, 275 U. S. 228, 6 AFTR 7070] * * * the evident purposes and objects of the statute in requiring that a claim be filed 'are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated.' "

This Court, too, stressed as the purpose of the statutory and administrative requirements, the function of the claim to apprise the Commissioner of the factual bases of the taxpayer's claims. Thus, the Court stated in *Rogan v. Ferry* (CCA-9, 1946), 154 F. (2d) 974, 977, 34 AFTR 1167, 1170, as follows:

"The statute and regulations governing claims are devised for the convenience of government officials in passing on claims for refunds and in

preparing for trial and they are not 'traps for the unwary.'

The principal requirement of these regulations and the statute is that the Commissioner be apprised, by means of the claim (which includes any supporting or amending documents such as a protest, affidavits or other supplements), of the exact basis of each ground on which a refund is claimed so that he may investigate the facts relative to these grounds and make his decision accordingly."